

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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608941 NJ INC, : Case No.: 23-cv-8966

Plaintiff, :

v. :

JEFFREY SIMPSON, et al., : New York, New York

Defendants : October 27, 2023

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TRANSCRIPT OF STATUS CONFERENCE HEARING
BEFORE THE HONORABLE ANDREW L. CARTER, JR.

UNITED STATES DISTRICT JUDGE

APPEARANCES:

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1 THE DEPUTY CLERK: Good afternoon. This
2 is Tara, Judge Carter's deputy.

3 Who just joined the call, please?

4 MR. MILIN: Hi. This is Richard Milin
5 from Griffin Hamersky. I'm sorry, Griffin LLP.
6 With me is Scott Griffin, and we represent Arch Real
7 Estate.

8 THE DEPUTY CLERK: Thank you, sir.

9 Good afternoon. This is Tara, Judge
10 Carter's deputy. Who just joined the call, please?

11 MR. KANOWITZ: Yes, good afternoon.
12 Richard Kanowitz, Haynes and Boone for the
13 plaintiff.

14 THE DEPUTY CLERK: Thank you, sir. Will
15 you be having co-counsel joining you today?

16 MR. KANOWITZ: I will be. Leslie Thorne
17 of Haynes and Boone should also be on the line.

18 THE DEPUTY CLERK: Okay. Thank you, sir.

19 Good afternoon, this is Tara, Judge
20 Carter's deputy. Who just joined the call, please?

21 MR. SCHWARTZ: Yeah, this is Alan
22 Schwartz. I'm not a party to the case. I just
23 wanted to listen in to the hearing.

24 THE DEPUTY CLERK: That's fine, Mr.
25 Schwartz. If you can just place your phone on mute.

1 Thank you.

2 MR. SCHWARTZ: Thank you.

3 THE DEPUTY CLERK: Good afternoon, this
4 is Tara, Judge Carter's deputy. Who just joined the
5 call, please?

6 MS. BOTTINI: Hi. This is Aishlinn
7 Bottini of Haynes and Boone. I represent Oak;
8 however, I won't be speaking on this conference.

9 THE DEPUTY CLERK: Okay. So you're just
10 calling in to listen, ma'am?

11 MS. BOTTINI: Yes.

12 THE DEPUTY CLERK: Okay. Great. Thank
13 you. If you can just place your phone on mute.

14 MS. BOTTINI: Absolutely.

15 THE DEPUTY CLERK: Good afternoon, this
16 is Tara, Judge Carter's deputy. Who just joined the
17 call, please?

18 THE COURT: Hi, Tara. It's Judge Carter.

19 THE DEPUTY CLERK: Hi, Judge.

20 Good afternoon. This is Tara, Judge
21 Carter's deputy. Who just joined the call, please?

22 THE LAW CLERK: Hi, Tara. This is Kim.

23 THE DEPUTY CLERK: Hi, Kim.

24 Just want to double check to see whether
25 or not we have counsel on the phone as of yet for

1 defendant, JJ Arch? Thank you.

2 (No verbal response.)

3 THE DEPUTY CLERK: Good afternoon. This
4 is Tara, Judge Carter's deputy. Who just joined the
5 call, please.

6 MR. ISRAEL: Sam Israel for JJ Arch and
7 Jeffrey Simpson.

8 THE DEPUTY CLERK: Thank you, Mr. Israel.
9 Good afternoon. This is Tara, Judge
10 Carter's deputy. Who just joined the call, please?

11 MR. MILLER: This is Wilson Miller with
12 Haynes and Boone.

13 THE DEPUTY CLERK: Good afternoon. This
14 is Tara, Judge Carter's deputy. Who just joined the
15 call, please?

16 MR. WEINER: This is Kevin Weiner, one of
17 the principals of 35 Oak, the plaintiff.

18 THE DEPUTY CLERK: Great. Thank you.

19 I do understand that we have some people
20 just dialing in to hear today's proceeding, and I
21 just ask that those individuals will place your
22 phones on mute.

23 Counsel, this telephone conference is
24 being recorded, so I ask that each time you address
25 the Court, to please state your name prior to

1 speaking, and when you are not addressing the Court,
2 to please place your phone on mute. Thank you.

3 Civil cause for a telephone order to show
4 cause hearing for a preliminary injunction in case
5 number: 23-cv-8966; 608941 NJ Inc. v. Simpson, et
6 al.

7 Counsel, please state your appearances
8 for the plaintiff.

9 MR. KANOWITZ: Yes. Good afternoon, Your
10 Honor. May it please the Court, Richard Kanowitz of
11 Haynes and Boone on behalf of the plaintiff.

12 MS. THORNE: Leslie Thorne on behalf of
13 the plaintiff. We're also joined by my colleagues,
14 Aishlinn Bottini and Wilson Miller, but Mr. Kanowitz
15 will be offering argument today.

16 THE DEPUTY CLERK: Thank you.

17 And for defendants, JJ Arch and Simpson?

18 MR. ISRAEL: Sam Israel for JJ Arch, LLC,
19 and Jeffrey Simpson.

20 THE DEPUTY CLERK: And for defendant,
21 Arch Real Estate?

22 MR. MILIN: Richard Milin of Griffin LLP.
23 And with me is Scott Griffin, representing, as you
24 said, Arch Real Estate Holdings.

25 THE DEPUTY CLERK: Thank you.

1 THE COURT: Okay. Good afternoon.

2 We're here today to discuss plaintiff
3 Oak's, request to remand this action for lack of
4 jurisdiction, and to seek a preliminary injunction
5 in joining defendants during the pendency of this
6 action from filing for bankruptcy.

7 I want to get a clearer sense of where we
8 are in terms of the lay of the land here. In the
9 party's most recent submissions, they seem to be, I
10 guess, in agreement that the issues of plaintiff's
11 access to defendant, A-R-E-H's documents and
12 information is moot, as well as the issue of
13 supplemental jurisdiction.

14 But let me hear more from the parties on
15 that, starting with plaintiff's counsel.

16 MR. KANOWITZ: Yes, Your Honor. Again,
17 Richard Kanowitz, Haynes and Boone for the
18 plaintiff. Thank you very much.

19 I don't believe it's per se moot. You
20 know, the lower court made clear through the hearing
21 transcript that's before Your Honor, that an order
22 will be entered granting access to the books and
23 records. So to the extent that we get that order,
24 and to the extent that we get cooperation in
25 furtherance of that order, yes, I believe that we

1 could argue that it is moot.

2 However, we believe that we're going to
3 unfortunately need guardrails and court assistance
4 with that. So what I would say is we believe that
5 if Your Honor remands it, we'll be before the lower
6 court on these issues, and we don't need to have it
7 here in federal court if Your Honor holds on to
8 jurisdiction.

9 THE COURT: And let me just ask before I
10 hear from the defendants, the "it" that you're
11 talking about remanding, is there an agreement
12 between the parties that Counts 1 and 2 of the
13 complaint should be remanded or no? Is there no
14 agreement on that?

15 MR. KANOWITZ: I would say I think this
16 is ships passing in the night. Obviously, we'd be
17 happy for all the things that Your Honor is -- will
18 not hold on to jurisdiction, if you so desire to
19 hold on to certain things, be remanded. There is,
20 as you could see from the transcript, ancillary
21 proceedings that are between the various different
22 parties at JJ Arch that percolated up to the lower
23 court's rulings from the other day.

24 THE COURT: Okay. Let me hear from
25 defendant, JJ Arch, on this.

1 MR. ISRAEL: Your Honor, my understanding
2 is that we didn't agree that it would be remanded.
3 So I think until you rule on it and it would be
4 remanded, it's before you.

5 THE COURT: Okay. And let me hear from
6 defendant, Simpson.

7 MR. ISRAEL: Same thing, Your Honor, I
8 represent both Jeffrey Simpson and JJ Arch, LLC.

9 THE COURT: Okay. And what about
10 defendant, AREH?

11 MR. MILIN: Your Honor, it's our position
12 that the issue is moot, that a ruling was issued by
13 the state court, which we intend to comply with.
14 The issue was not briefed in plaintiff's reply
15 brief. They did not contend that the Court should
16 enter an order of remand.

17 As far as I'm concerned, I think, Your
18 Honor, that the issue is moot, and that accordingly,
19 no remand should be issued.

20 THE COURT: Okay. Let me get a clearer
21 sense of where we are before we start delving into
22 some of these other legal issues.

23 From plaintiff's perspective, what is the
24 end goal here? I know what you're looking for in
25 this particular litigation, but what is the end

1 goal? Have the parties had any sort of settlement
2 discussions at all broken down? Are those not
3 started? Where are we going with this?

4 MR. KANOWITZ: Excellent question, Your
5 Honor. And, frankly, as a bankruptcy lawyer for 30
6 years, when I come into these types of situations,
7 that's the first thing I ask. How do we maximize
8 value, right, for all constituency? And the answer
9 is, my understanding is that Mr. Simpson refuses to
10 abide by his fiduciary duties -- and we don't need
11 to go into the details why or whatever -- and that
12 has prompted the litigation, not only litigation by
13 the plaintiff, but litigation by his co-member in
14 the JJ Arch entity.

15 So we have a situation, unfortunately,
16 where instead of business being conducted in the
17 normal course, where full discovery and transparency
18 is made to partners so that they could make
19 decisions about things. We're in a litigation
20 posture. We're in a litigation mode. And that is
21 not helpful to anybody's interest.

22 Our concern, obviously, in bringing this
23 action was based on the statements made. The key
24 issue here is that the two members of Arch need to
25 agree on major decisions, whether it be financing,

1 whether it be bankruptcy, whether it be something
2 else. And having done bankruptcy for 30 years, Your
3 Honor, both on company side and creditor side, I
4 could just tell you bankruptcy is not a magic
5 bullet. It costs a lot of money to start up a
6 proceeding. It costs a lot of money to maintain the
7 proceeding. It has to have an end game with a
8 strategic goal, whether it's a sale, whether it's a
9 reorganized entity. None of that is being explored
10 here.

11 Instead, unfortunately, what we have --
12 and again, I won't go into the details and the
13 merits and the pointing fingers because the record
14 is before you in connection with the lower court, as
15 well as why you issued a TRO, and why we're here on
16 the preliminary injunction -- that instead of
17 working together, instead of having transparency,
18 instead of figuring out the best path forward to
19 maximize value, again, we're at odds.

20 And we're at odds because we believe that
21 the strategic tool of bankruptcy is being used as a
22 weapon. Even though the operating agreement under
23 New York law requires consent. Even though the
24 bankruptcy rules under -- you just have to look at
25 local Bankruptcy Rule 1074 -- requires an authorized

1 filing by consent. It's explicit.

2 So instead of having that cooperation,
3 that workable solution where partners sit down,
4 explore options, figure out how are we going to fund
5 things, figure out the best strategy. Maybe
6 bankruptcy is, maybe it's not. We're not
7 foreclosing it. But to have bankruptcy held as, I'm
8 going to burn down the house if you don't pay, is
9 not a productive way to maximize value.

10 So from our perspective, that is the
11 genesis of the litigation, both here in front of
12 Your Honor, and also in the state court. Not only,
13 again, between the plaintiff and defendants, but the
14 defendants and other managing partners of their own.
15 And that is before the lower court, and that is
16 reflected in the transcript that you saw the other
17 day.

18 So I'll stop there and say, we look
19 forward to working with our partners. We just have
20 to have information, and we have to have, what I
21 would say is a strategic discussion and not threats.

22 THE COURT: I guess what I'm -- I don't
23 mean to circle back because that was a lot that you
24 stated about the history of this case and some of
25 the ill will between the parties. But, I guess, I

1 go back to, what is it that you want? Like putting
2 aside the preliminary injunction, and putting aside
3 this -- it seems that what you're saying, but I
4 don't want to put words in your mouth, is that you
5 want the records. It seems like you're getting
6 those, and you want to have discussions with Mr.
7 Simpson.

8 Is there something else that I'm missing?

9 MR. KANOWITZ: I don't believe so. We
10 want compliance with the operating agreement, of
11 course. And so absent protection by Your Honor or
12 the lower court, we feel that we won't get
13 cooperation, we won't have productive discussions.
14 And, in fact, a decision without our consent will be
15 made in violation. So, yes, Your Honor, our goal is
16 to maximize value.

17 And if we need to have Your Honor
18 issue -- again, if Your Honor holds onto this
19 case -- a preliminary injunction while we discuss
20 among the partners the best path forward, then that
21 will be our request. To be protected while these
22 discussions and this situation unfolds.

23 THE COURT: And this lack of
24 communication between the partners, it seems that
25 you're saying that Mr. Simpson has refused to speak

1 or communicate, at least first.

2 Is this a situation in which the other
3 partners could communicate what they want to Mr.
4 Simpson to start this sort of cooperative agreement?
5 Or is this like a 7th grade dance, and no one wants
6 to go first? What are we talking about here?

7 MR. KANOWITZ: I believe the record is
8 clear with communications back and forth about some
9 of the matters. But when you have a fiduciary
10 managing member, that member has to be the punctilio
11 of honor here. He has to act as a fiduciary. And,
12 unfortunately, that has broken down. Whether right
13 or wrong, we need a path forward. Again, where
14 parties are talking to one another, not under the
15 threat of bankruptcy, but strategic alternatives,
16 including what to fund and what not to fund, needs
17 to be discussed in a constructive manner.

18 And I think the only way we get there,
19 unfortunately, Your Honor, is through court orders
20 in the first instance, protecting the plaintiff's
21 rights, and then have the parties recognize that the
22 agreements will be enforced. And then move forward
23 hand-in-hand, hopefully, to solve these problems.

24 And if bankruptcy is an option, the
25 plaintiff will consider that, but not under the

1 threat of burning down the house because the
2 plaintiff will not fund unclear demands about what
3 needs to be funded.

4 THE COURT: Let me hear from defendant,
5 AREH. What is your end goal here?

6 MR. MILIN: Your Honor, our end goal is
7 to save the company, to protect the stakeholders,
8 and to make things work out. What you've just
9 heard, Your Honor, there's so much that we disagree
10 with that it's hard to go through all of it. But
11 certainly, we do not agree that there's been a
12 breach of fiduciary duty here. And it's certainly
13 untrue to suggest that we wouldn't talk.

14 When my firm was first engaged, we called
15 Haynes and Boone and we said, what do you want?
16 This is the kind of dispute in which an eye for an
17 eye can make the whole world blind. We don't want
18 that to happen. Let us move forward together, and
19 let's start with the documents, because if you can't
20 work that out, you're nuts. They promised to get
21 back to us, Your Honor. They didn't.

22 Your Honor, we are happy to try to work
23 something out. And we should also add that in state
24 court, plaintiff joined an action in which Oak is
25 not a party and sought an order appointing a

1 receiver, sought an order stopping a bankruptcy,
2 sought an order with numerous provisions. We
3 responded. It's on the record with a marked-up
4 order that said, no, you can't take away the right
5 to file bankruptcy if that is in the interest of
6 stakeholders. It's not a two-party dispute. It's a
7 multi-party dispute. There's federal policy in the
8 background. You have to retain that.

9 But we said expressly in our
10 communications with the Court and in our marked-up
11 order, that we want to give them information they
12 need so they will stop being mistrustful and stop
13 accusing Mr. Simpson of breach of fiduciary duty.
14 And we are willing to live by reasonable guardrails
15 in order to build their trust. But the result has
16 been extraordinary litigation activity.

17 So what's the end goal? What they
18 stated, but which isn't happening, and which we'd
19 like to happen.

20 THE COURT: Okay. Let me hear from
21 defendant, JJ Arch and Simpson. What is the end
22 goal here?

23 MR. ISRAEL: Your Honor, we agree with
24 what was just said by ACEH and take issue with many
25 of the statements that were just made about how Mr.

1 Simpson is allegedly breaching fiduciary duties. We
2 don't agree with any of that. And we're more than
3 happy to cooperate and have fruitful discussions
4 towards resolving the issues that are before the
5 parties.

6 THE COURT: Okay. Let's move to the
7 issue of jurisdiction. I understand defendant's
8 views as it relates to Count 3 and 4 of the
9 complaint, but what is the defendant's view as to my
10 jurisdiction over Counts 1 and 2?

11 Let me hear from AREH first.

12 MR. MILIN: First, Your Honor, that could
13 only be supplemental jurisdiction. Counts 1 and 2
14 are the counts for books and records. As I recall,
15 they would only be before Your Honor on supplemental
16 jurisdiction. And as we've said, we think it's
17 moot. It's being resolved by the state court right
18 now in another action.

19 So a remand really wouldn't serve much
20 purpose. But, certainly, we wouldn't expect Your
21 Honor to rule on it today or anytime soon.

22 THE COURT: Well, I guess I'm a little
23 bit confused. If you're saying it's potentially
24 moot or the state court is ruling on it, why should
25 I hold on to Counts 1 and 2?

1 MR. MILIN: Understood, Your Honor. The
2 question is whether Your Honor would prefer to hold
3 on to those counts as potentially within
4 supplemental jurisdiction or -- but currently moot,
5 or remand them pending further developments. Either
6 one would be acceptable to us.

7 THE COURT: Okay. Let me hear from
8 defendant, JJ Arch and Simpson on this.

9 MR. ISRAEL: Your Honor, we agree with
10 what was just said by ACEH.

11 THE COURT: Okay. Well, let me hear
12 from -- does plaintiff have anything to add on this
13 issue?

14 MR. KANOWITZ: Your Honor, you should
15 remand them. If the state court is dealing with all
16 the discovery books and records issues, then we'll
17 be before the state court.

18 THE COURT: Okay. Let's turn to Counts 3
19 and 4. I directed the parties to analyze the
20 jurisdictional issue under the test set forth in
21 *Grable & Sons*, and *Gunn v. Minton*.

22 Defendants argue that the issue of
23 impending bankruptcy is necessarily raised in this
24 case. I'm still considering that issue, but I'm, at
25 this point, inclined to agree with the defendants.

1 But let me hear from the plaintiffs as to
2 why the Grable/Gunn test is not satisfied in this
3 case as it relates to Counts 3 and 4 of the
4 complaint.

5 MR. KANOWITZ: Yes, Your Honor. First,
6 there is no federal issue. This is a state law
7 corporate governance matter. End of story. You
8 just need to look at the bankruptcy rule again.
9 1074-1, Southern District of New York. To be able
10 to have an authorized bankruptcy filing, you have to
11 comply with state law. There is no federal overlay
12 here, Your Honor.

13 We are seeking to enforce the operating
14 agreement under New York law to the extent that the
15 defendants believe they have a defense, i.e., that
16 somehow the operating agreement needs to be
17 rewritten because it violates public policy, for
18 whatever reason, on the majority decision, okay.
19 That is a defense that does not get raised in
20 connection with Your Honor's jurisdiction. A
21 defense cannot be a basis for jurisdiction.

22 So we go through all of the elements for
23 the analysis, including the well-pled complaint
24 rule, and demonstrate to Your Honor that there is no
25 federal overlay here. I understand the appeal for

1 it because when you talk about bankruptcy, you're
2 talking about Chapter 11 and Chapter 7. I would
3 just point out, Your Honor, that the bankruptcy
4 action, as contained in the operating agreement on
5 major decisions also indicates state law remedies,
6 not just a Federal Chapter 11 or Chapter 7
7 proceeding, but also state law remedies.

8 So clearly, Your Honor, on -- that type
9 of bankruptcy action wouldn't have a federal
10 jurisdictional policy. So what I think the
11 defendants are doing is trying to say there's
12 something out there in the ether, and we find the
13 operating agreement problematic; and, therefore, we
14 have a defense to the extent that you should try to
15 stop us under state law. But by you enforcing the
16 agreement under state law, that's not a federal
17 question. There's no jurisdiction whatsoever. We
18 explained the various different cases that go into
19 this issue, your Honor.

20 This is, again, corporate governance.
21 The first thing you do when you're a counsel to a
22 company is you figure out who is authorized to speak
23 on behalf of that company. And you just need to
24 look at, through the cases that we cite, your Honor,
25 wherever this issue has been decided in connection

1 with supermajority or majority vote, or any of those
2 type of actions under state law. The bankruptcy
3 courts and the district courts and the Supreme Court
4 say, look to state law. It's not a federal issue.

5 So from our perspective, we meet all the
6 elements of every test to demonstrate that there's
7 no federal issue in connection with what we're
8 seeking in our complaint.

9 Again, at best they raise some sort of
10 public policy as a defense to rewrite the state law
11 agreement that will be enforced in accordance with
12 state law.

13 And to be actually straight and very
14 clear, Your Honor, what would happen if they
15 violated the state law agreement is a couple of
16 things.

17 First, we would move in the bankruptcy
18 court to dismiss it as an unauthorized filing. You
19 don't get to file bankruptcy, you have to be
20 authorized to file bankruptcy, and the corporate
21 documents speak for that. So we'd move to dismiss.
22 To the extent that we wouldn't get dismissal, we
23 would move, in the alternative, for a Chapter 11
24 trustee, for all the reasons we talk about, about
25 breach of fiduciary duty, all those type of things.

1 The third thing we potentially would do
2 is seek sanctions for filing a bankruptcy that's
3 unauthorized, in violation of the federal rules, the
4 bankruptcy rules, et cetera. And to the extent that
5 anyone makes a false oath about the authority to
6 file bankruptcy, okay, that could potentially be a
7 bankruptcy crime.

8 So these are very serious matters. And
9 the reason why the operating agreement is structured
10 the way they are is because that was the bargain for
11 right, but it's bargain for right corporate
12 governance under state law. There is no federal
13 touch point as to either our complaint or their
14 defense which gives this Court jurisdiction.

15 And that's key, Your Honor, right.
16 Because even if they're right, even if they could
17 convince the State Court somehow that the
18 interpretation, and the clear and unambiguous state
19 court's operating agreement shouldn't be enforced
20 because there's a prohibition somehow or a public
21 policy issue, that's a defense that doesn't get
22 determined by Your Honor to hold on to those counts
23 that seek enforcement of the state court action.
24 I'll stop there.

25 THE COURT: Okay. Let me just ask you

1 something, but again, the complaint is a little bit
2 more directive than that. The complaint in Count 3
3 is asking for injunctive relief, and is asking to
4 prevent defendants from filing for bankruptcy.

5 So let me ask you this, I think I
6 understand your position between -- there is a
7 difference between a state law and whether or not a
8 contract has been entered into under state law,
9 whether there has been offer acceptance,
10 consideration, damages and the like versus the
11 enforceability of that contract under state law or
12 under federal law.

13 And I think your position is that
14 enforceability is a defense. I'm not sure if that's
15 necessarily right, but even if it is right, the way
16 that that complaint is stated, because you are
17 asking me, you're asking the state court before this
18 case got removed to enforce that agreement. I'm not
19 sure that that's a defense in that context.

20 I'll give you a chance to address that.

21 MR. KANOWITZ: Well, it's seeking
22 declaratory relief to set out the parties' rights
23 and responsibilities under state law and that
24 operating agreement. And we need the preliminary
25 injunction because defendants have basically said,

1 we're going to repudiate that agreement, we're not
2 going to abide by it. And that's a problem for us.
3 And their argument is, we don't have to abide by the
4 state law, we could do what we want. Obviously,
5 that's not appropriate, but putting that aside, and
6 they're saying they could do it because there's some
7 sort of federal idea out there.

8 And by the way, Judge, there's no
9 bankruptcy rule that permits this, meaning that they
10 could just initiate an operating agreement that
11 requires consent for bankruptcy. Remember, this is
12 not a prohibition against bankruptcy. This is not a
13 restriction. You can't file bankruptcy.

14 The company itself can file bankruptcy.
15 But to get into bankruptcy, it's under the state law
16 agreement. And when we understand from the e-mails
17 and from the threats that if you don't do what I
18 want -- okay, I'm just paraphrasing what the e-mails
19 say -- I am going to file bankruptcy irrespective of
20 what the contract says. That is the basis for our
21 preliminary injunction interest, which is why we
22 phrase it, we need to stop them from violating the
23 state law agreement for whatever reason.

24 And the majority decision is not just
25 about bankruptcy. It's a whole host of other

1 business items. So you have the managing member who
2 owes fiduciary duties, who has day-to-day
3 operations. But when it comes to certain things,
4 i.e., bankruptcy, there has to be consent for the
5 company itself to file bankruptcy. And if the
6 defendants believe that's not how it works, that's a
7 defense.

8 THE COURT: Well, let me ask plaintiff's
9 counsel something, then I'll hear from defendants.

10 Certainly, the Second Circuit case that
11 you cited is a case that stands for the proposition
12 that generally these sorts of agreements, in
13 general, can be enforceable, but do you have a
14 single case that indicates that a party may be
15 prevented from filing for bankruptcy in this
16 context? Let me just rephrase that and make this a
17 little clearer.

18 It's one thing to say that someone lacks
19 authority to file bankruptcy. If some random
20 individual that has no connection with Sears says, I
21 think Sears isn't doing well and I want to file for
22 bankruptcy on Sears' behalf, someone certainly could
23 move to dismiss the bankruptcy petition because that
24 person didn't have authority to do that. And
25 bankruptcy court would entertain that and probably

1 grant that motion.

2 It's a different context when what is
3 preventing someone ostensibly from filing for
4 bankruptcy is this sort of agreement. So these
5 sorts of agreements have been held to be okay in a
6 non-bankruptcy context.

7 Do you have any cases in which this sort
8 of agreement was enforced in the bankruptcy context?

9 MR. KANOWITZ: Yes, Your Honor. Take a
10 look at *Pasta Bar by Scotto*. It's exactly on point.
11 That case was an unauthorized filing because there
12 was not supermajority under the operating agreement,
13 New York state law, and the bankruptcy case was
14 dismissed for an unauthorized filing.

15 Now, of course, we never want to get
16 there, Your Honor, because the harm that will happen
17 to plaintiff if we allow the defendant to go and
18 ignore the agreement. But that's why we need the
19 preliminary injunction. You also could take a look
20 at *In Re: 477 West 142nd Street Housing Development*.
21 Same idea.

22 And the construct there where a voluntary
23 petition for bankruptcy is filed on behalf of a
24 corporation, the bankruptcy court does not acquire
25 jurisdiction unless those purporting to act for the

1 corporation have authority under local law to
2 institute the proceedings. Including also, Your
3 Honor, we cited the Supreme Court case that talks
4 about state law controls.

5 The issue again, Your Honor,
6 unfortunately in the bankruptcy setting is that once
7 there is an unauthorized filing, then the party in
8 interest who's harmed has to do something. That's
9 not the way it should go. Fiduciaries need to abide
10 by their agreements. Fiduciaries need to also take
11 into consideration what their obligations are. And
12 the obligation here under New York state law, that's
13 an enforceable contract is to have consent to file
14 the bankruptcy.

15 And so what I would say in connection
16 with this is that there is no federal right here.
17 All the cases point to prohibiting, under New York
18 state law, these type of actions. The only cases
19 out there that talk about what the defendants want
20 to do, and there's some federal right, is when a
21 lender or some other creditor tries to get a waiver
22 from a company to file bankruptcy. That's not the
23 case here. We're not talking about a waiver. The
24 company could file bankruptcy.

25 The problem for the defendants is the

1 company has to get consent to be able to be an
2 authorized filing. Every single place where you
3 look at upholds that. And, in fact, again, maybe
4 I'll chirp on it a little more. If you look at
5 local bankruptcy rule 1074-1, if you look at the
6 model forms that are promulgated to file bankruptcy,
7 in the first instance, your Honor, it must be an
8 authorized filing. And local bankruptcy rule
9 requires that the partners in a partnership consent,
10 or in a corporation be duly authorized by the board
11 of directors.

12 We're not going to have that here. We
13 cannot have a managing member disregard obligations
14 under the operating room and file bankruptcy.
15 Otherwise, like I said, there'll be actions to
16 undertake by the plaintiff, unfortunately including
17 but not limited to, seeking dismissal, seeking
18 appointment of Chapter 11 trustee, seeking
19 sanctions, potential criminal referral out for
20 violating, for saying that they have the authority
21 when clearly everyone knows that they don't.

22 THE COURT: Okay. Let me hear from
23 defendant, AREH, on this.

24 MR. MILIN: Thank you, Your Honor. Once
25 again, there's a lot there, and I would like to

1 address to the extent I can. Well, all if I can,
2 and as much as possible.

3 First, just a couple of fact issues to
4 get out of the way. Their complaint actually talks
5 about Oak's power to veto a bankruptcy in paragraph
6 55. So I don't think it's quite as benign as we
7 just heard. Also picking up on something that Your
8 Honor said, this case is utterly unprecedented.
9 Utterly unprecedented. They cite no case in joining
10 a bankruptcy filing in advance, not in State Court,
11 not in Federal Court, not in Bankruptcy Court, not
12 in any court.

13 They cite no State Court case which
14 decided whether an LLC member's right to veto a
15 bankruptcy was valid. All of the relevant cases
16 were in federal or bankruptcy court. Your Honor,
17 Oak's reply cites only two state court cases; *Ronan*
18 and *2207 Pavilion*. And even the word "bankruptcy"
19 doesn't appear in either one. And they cite no case
20 holding, as they've just tried to tell Your Honor,
21 that federal policy concerns about blocking rights
22 once raised, were irrelevant.

23 Many cases hold, as our brief shows, that
24 blocking rights must be evaluated in light of
25 federal policy. The cases say, first you look at

1 state law authorization, then you look at federal
2 authorization. The cases they cite *Quad-C* and
3 *Hightstown*, which I believe both have dropped out of
4 their reply, both follow exactly that analysis.
5 Plus, they're the cases we cited; *In Re: Lexington*
6 *Hospital, Intervention Energy, Pace*, all of those
7 cases say there are two levels here. There's state
8 law, there's federal law.

9 First you look at whether a claim is
10 valid under state law, and that is where the
11 bankruptcy rule that was just cited to us comes in.
12 But your Honor, you cannot deny -- they cannot deny
13 that there's a federal overlay which appears in like
14 ten cases. So, yes, federal law is the essence of
15 the claim asserted here.

16 Oh, and by the way, I should add that the
17 *Pasta Bar* case that they just relied on doesn't
18 address any federal issue at all. And what's more,
19 just to be sure we weren't misleading the Court, we
20 checked the underlying briefs. No federal issue was
21 raised in that case. The fact that it wasn't raised
22 doesn't show that there was no issue. They didn't
23 raise the issue and have the Court say no. They
24 didn't raise the issue. And accordingly, the Court
25 didn't address it. It's not a ruling if a Court

1 doesn't address an issue, and it doesn't show
2 whether federal policy is relevant or not. So
3 that's some of what they said.

4 We've also shown, Your Honor, that
5 jurisdiction does exist in the federal court under
6 Gunn/Grable that the well-pleaded complaint rule,
7 which the other side relies on, doesn't apply here
8 because the Second Circuit, squarely held a month
9 ago that it was an exception.

10 And we also have a case to cite for Your
11 Honor, which I'll find in a moment. Oh, yes. *New*
12 *York versus International Joint Commission*. It's a
13 Western District of New York case. It holds that a
14 state law claim could be removed based on a federal
15 FSIA, the Federal Sovereign Immunity Act, defense
16 notwithstanding the well-pleaded complaint rule.
17 That's 599 F.Supp 3d 146.

18 So first of all, it's our position, as
19 Your Honor knows, that the right that they seek to
20 assert is inherently a federal right. It's the
21 right to file a bankruptcy. It's recognized as a
22 constitutional right in several cases. It's, at a
23 minimum, a constitutionally-mandated right, and they
24 seek to exercise control over that right.

25 Indeed, today, they've tried to downplay

1 the veto aspect of what they're asking for and say,
2 well, we just want to control it. But controlling
3 the federal right to file a bankruptcy is inherently
4 a federal issue.

5 What's more, we've cited the Nasdaq case
6 to Your Honor in our letter, which says that because
7 they've asked for a declaratory judgment, the Second
8 Circuit analyzes that as if the parties were
9 reversed, and as if the question were what would
10 happen if the party against whom a declaration is
11 sought did what it wanted to do? Would that be
12 within federal jurisdiction? Because we don't want
13 parties to be able to stop a legitimate federal
14 filing by presenting it in a declaratory judgment as
15 a state law issue.

16 So here we think that under *Nasdaq*, the
17 question before Your Honor is if we wanted to file a
18 bankruptcy, would that be a federal right? And it
19 clearly would. And what's more, I'm sure they'd
20 say, oh, you got to look at the contracts, it's
21 still state law. It's not. Because the point of
22 the Nasdaq rule is that the parties trying to stop
23 federal jurisdiction by artfully pleading a state
24 law claim should not be able to dictate what is
25 truly at issue. And it's clear what's truly at

1 issue here is the federal right to file a
2 bankruptcy.

3 And in addition to those arguments, as
4 Your Honor knows, we've argued that the *Gunn* and
5 *Grable* test is satisfied here, both because federal
6 law is inherent in the issue before the Court, as
7 the many cases I've just cited hold, the *Pace* case,
8 the *Hightstown* case, the *Quad-C* case and on and on.

9 And I can go through the rest of the
10 requirements of *Gunn* and *Grable* if Your Honor would
11 like, but I think that covers most of what was said
12 so far.

13 THE COURT: Okay. Let me hear from
14 defendant, JJ Arch and Simpson.

15 MR. ISRAEL: Your Honor, we agree with
16 what was just said. I mean, to our mind, the
17 validity of the bankruptcy restrictions is a matter
18 of federal law. We cited cases on that point, and I
19 think it's sophistry to try to get beyond that. It
20 seems to me that it's pretty clear that this is
21 something over which the federal court has
22 jurisdiction. And we satisfy -- or the *Gunn* and
23 *Grable* tests are satisfied, and it really isn't a
24 close call.

25 THE COURT: Okay. I'll hear if there's

1 anything else from plaintiff on this, and then we'll
2 move on to the issue of preliminary injunction.

3 Anything else from plaintiff on that?

4 MR. KANOWITZ: Yes, your honor.

5 The law is clear. In *Wechsler v. Hunt*
6 *Health*, it's 216 F.Supp. 2nd 347, public policy
7 objections to enforcement of contracts is an
8 affirmative defense.

9 Like I said earlier, they don't get
10 federal jurisdiction on defenses, okay. If they
11 wanted to come to court and plead to stop us from
12 enforcing the contract because of some sort of
13 public policy, you'd still interpret the contract.
14 It's the contract, contract, contract. That decides
15 who gets to speak for the corporation.

16 Again, this is not about filing
17 bankruptcy or not filing bankruptcy. It's who
18 speaks for the corporation. That is not a federal
19 determination. They want to be able to file
20 bankruptcy, and then let us undo that, unscramble
21 that egg. That's not how this works. And that's
22 not how the cases allow.

23 And, in fact, if you look through the
24 cases we cited, and even look at through their cases
25 that talk about these issues, okay, this public

1 policy idea doesn't come into play under the
2 bankruptcy code, bankruptcy rules, et cetera, until
3 there's an authorized filing. The authorization is
4 under state law, and their defense to this of
5 federal law, i.e., the bankruptcy code is a defense
6 that this Court doesn't have jurisdiction over
7 because you shouldn't first look at it. You should
8 look at the complaint that we're seeking, which is
9 to enforce our state law rights.

10 THE COURT: Okay. Let's move on to the
11 issue of preliminary injunction.

12 Let me hear from plaintiff more in terms
13 of irreparable harm. You indicated that if the
14 injunction is not granted, and if the defendants
15 move, file for bankruptcy, you could file a motion
16 to dismiss in bankruptcy court. I know that
17 wouldn't be ideal, but how is that irreparable harm?

18 MR. KANOWITZ: Well, a couple of things.

19 One, you're vitiating the bargain for
20 state court rights. What basis is that to do? This
21 was an LLC agreement where two members agreed, one
22 would be the managing member, one would invest
23 money. What's the basis to destroy that? That's
24 what they're asking, and that's the problem.

25 And there are cases that we cited that we

1 could go through that demonstrate that, for purposes
2 of a preliminary injunction, that's exactly what
3 gets enjoined, destruction of the parties' rights
4 under those agreements. So that's one issue.

5 Two, bankruptcy again, it's a strategic
6 tool. It unleashes a lot of problems, including
7 cross defaults and guarantees. And as we put in
8 there, a lot of money is at stake. So while Mr.
9 Simpson could say, I'm going to burn the house down,
10 what's going to potentially happen is that an
11 unauthorized filing will cause the plaintiffs
12 hundreds of millions of dollars at issue because
13 potentially, if not exactly, on guarantees of
14 obligations to lenders, they will become due and
15 payable. That is not what's happening yet.

16 So the way we look at this situation is
17 if Your Honor kept a preliminary injunction in
18 effect, if you take jurisdiction, again, assuming
19 you take jurisdiction, there is no harm. We could
20 try to work out our situation with our creditors,
21 even among the partners here, but nobody would be
22 able to burn the house down. And that's what
23 they're really trying to do. They want to utilize
24 the threat of bankruptcy to cause the harm of
25 vitiating contract rights, inappropriate, and

1 causing economic harm to the plaintiffs. Again, not
2 appropriate.

3 So we are harmed in multiple different
4 ways on a bankruptcy filing. And a preliminary
5 injunction stays that impact. And what are we going
6 to sue them for; \$400 million, because of an
7 unauthorized bankruptcy filing? How are we going to
8 ever collect that? Mr. Simpson doesn't have that
9 money. We're the primary investor. We're the
10 primary economic beneficiary of this, I would say,
11 interwoven organization.

12 So it's real easy for the managing member
13 to breach their fiduciary duty and say, yeah, you
14 didn't get me what I wanted, I'm filing bankruptcy
15 unauthorized, come and get me. That's just not the
16 way business should operate, and that's not what the
17 laws provide.

18 So we would say you should issue the
19 preliminary injunction, maintain the status quo,
20 because if not, we are irreparably harmed by
21 destruction of our contract rights and destruction
22 of our economic rights in connection with this
23 business.

24 THE COURT: Okay. Let me just ask
25 plaintiff this. If not for this provision in the

1 contract between the parties, would you agree that
2 the defendants would have a right, an unfettered
3 right to file for bankruptcy?

4 MR. KANOWITZ: No, there's no such thing
5 as unfettered right. If the agreement was silent,
6 okay, you still have to have an authorized filing.
7 The state law would then supplement what the parties
8 didn't agree. And by the way, I've had many
9 situations where it is silent, and you then turn to
10 your fiduciary duties and say, what is in the best
11 interest of all stakeholders? And you then could
12 make a determination to file bankruptcy because it
13 was authorized.

14 This agreement basically said the
15 corporation can file bankruptcy under these
16 circumstances. And there's nothing. Nothing about
17 that issue that's violation of federal law, of
18 federal policy. So the answer is unfettered, not
19 unfettered. You have to have a basis to file
20 bankruptcy. A solvent company with no creditors
21 can't file bankruptcy. In fact, the *Johnson &*
22 *Johnson LTL* case just got dismissed for that very
23 purpose, right, where the Court, the Third Circuit
24 Court of Appeals basically said, well, *Johnson &*
25 *Johnson*, you're going to pay all these asbestos and

1 talc issues, all these torts. There's no purpose
2 for bankruptcy.

3 So the answer is it's a little bit more
4 complex, but it has to be an authorized filing.
5 Step one, is it authorized? And that's a state law
6 question.

7 THE COURT: Well, let me rephrase the
8 question. Maybe this is splitting hairs, but would
9 you agree that they would have a right, an
10 unfettered right to file a bankruptcy petition, but
11 not an unfettered right to keep that petition in
12 bankruptcy court if someone moved to dismiss it? Or
13 if the bankruptcy court on its own decided to
14 dismiss it?

15 MR. KANOWITZ: If the majority decision
16 was written out, yes, they could file bankruptcy.
17 And the question would be, was it authorized? It's
18 still whether it's authorized.

19 THE COURT: Let's just say take it out of
20 this context. Let's say that it's not about this
21 sort of agreement. Again, someone who clearly has
22 no real authority to file bankruptcy petition,
23 again, this person out on the street who decides to
24 file a petition on behalf of Sears, they have no
25 connection to Sears at all. They file it and it

1 would get dismissed. But they would have a right to
2 file. They just wouldn't have a right to keep it
3 there; is that correct?

4 MR. KANOWITZ: I assume if you mean the
5 right to file and be not subject to other problems,
6 i.e., a false oath of bankruptcy crime, you know,
7 sanctions, yes. The answer is yes. You could go to
8 the clerk's office. In fact, it's electronic filing
9 these days. You don't even go to the clerk's
10 office, as you know. And you could file, and under
11 penalty of perjury say, I'm authorized to file, and
12 this is the company that needs to be filed, and you
13 could attach a fraudulent fake resolution. Yes, you
14 could do that.

15 THE COURT: Okay. Let me hear from
16 defendant, AREH, on that.

17 MR. MILIN: Your Honor, thank you.

18 We've heard some mischaracterizations
19 from plaintiff in that last dialogue, and I think
20 it's important to take a step back.

21 First, I'd like to emphasize what the
22 facts really are here, because it's undisputed that
23 Arch is a vertically-integrated enterprise, that it
24 manages about 20 real properties, that it has
25 creditors, employees, and its subsidiaries have

1 creditors and employees, altogether about 60
2 employees enterprise-wide and \$150 million in
3 investors.

4 Oak admits that it represents only about
5 a third of that amount, 50 million of the 150. Oak,
6 on the other hand, is the 2023 version of the astute
7 creditor discussed in case law. Under the LLC
8 agreement, Oak is an investor member prohibited from
9 engaging in management, and the agreement doesn't
10 subject Oak to fiduciary duties. They talked a lot
11 about fiduciary duties today, but they haven't said
12 that they have any.

13 And Mr. Weiner's declaration says that
14 Oak has contributed \$3 million to Arch, and that
15 they're entitled to receive that money back before
16 any revenues are distributed as returns on equity.
17 Moreover, the 3 million is only a fraction of the 50
18 million that Oak says it's invested in Arch
19 Properties.

20 So, Your Honor, I think it's important
21 context for this issue to see that Oak is not just
22 an ordinary LLC member exercising ordinary member
23 rights in an ordinary LLC. Yes, it's an equity
24 owner rather than a lender, but in important ways
25 for purposes of analyzing its right to block a

1 bankruptcy, it's very like a creditor holding a
2 golden share purchased for a fraction of its total
3 investment.

4 Now, they want, given those facts, what's
5 really going on here, Your Honor, is not that we're
6 threatening bankruptcy, but that we're trying to
7 protect the right to protect the stakeholders as a
8 whole. And there are a lot of them. What Oak wants
9 to do is, as a minority LLC member and a minority
10 investor, hijack the company to protect their own
11 interests at the expense of those stakeholders.

12 I mean, Your Honor, they're not talking.
13 They didn't respond to our saying, yeah, we want to
14 talk by saying, okay, let's talk next Tuesday.
15 They're not funding. They have reasons why not, but
16 we don't accept those reasons. They're seeking a
17 receiver in state court, and they're even seeking a
18 proposed order in state court to take over the
19 company.

20 Your Honor, in that circumstance, Oak
21 can't be allowed to hijack a potential bankruptcy
22 filing, hijack the interests of all stakeholders.
23 Oak should be subordinate to the federal policy of
24 protecting all stakeholders, ensuring the right to
25 reorganize and benefiting society in that way.

1 THE COURT: Okay. Let me hear from
2 defendant, JJ Arch and Simpson.

3 MR. ISRAEL: Your Honor, we subscribe to
4 what ACEH just said. Nothing further.

5 THE COURT: Okay. Let me find out from
6 defendants, is there any imminent desire to file for
7 bankruptcy? Let me hear -- go ahead.

8 MR. MILIN: Sorry, Your Honor. There's
9 no imminent desire to file for bankruptcy. Nobody
10 wants to file for bankruptcy if it's avoidable, and
11 we're working very hard to make it unnecessary. But
12 we are kind of stuck for cash right now because Oak
13 isn't funding.

14 THE COURT: And let me hear from the
15 other defendant, JJ Arch and Simpson on this.

16 MR. ISRAEL: That's right, Your Honor.
17 There's no immediate desire to file for bankruptcy.
18 It's a necessary option in the event that we can't
19 survive.

20 THE COURT: Okay. Here's what I think
21 makes sense. I still need to figure out for certain
22 whether or not I have jurisdiction. At this point,
23 I believe that I do. But I want to make absolutely
24 sure. So let's do this, especially in light of the
25 fact that the defendants have indicated there's no

1 immediate desire to file for bankruptcy. I will
2 extend the TRO until November 2nd, a week from
3 tomorrow. And we'll have a conference at 3:00 that
4 day.

5 Are counsel available that day? Counsel
6 for plaintiff?

7 MR. KANOWITZ: Checking my telephone.

8 THE COURT: It will be by telephone.

9 MR. KANOWITZ: So you want to have a
10 conference on November 2nd in the afternoon at 3:00,
11 the Thursday?

12 THE COURT: Yes.

13 MR. KANOWITZ: Your Honor, I am
14 available. I assume Ms. Thorne is also available as
15 she is co-counsel with me on this matter.

16 THE COURT: Ms. Thorne, are you
17 available?

18 MS. THORNE: I am. Thank you, Your
19 Honor.

20 THE COURT: All right. And defendant, JJ
21 Arch and Simpson, are you available at that time?

22 MR. ISRAEL: Yes, we are, Your Honor.

23 THE COURT: And defendant, AREH, are you
24 available at that time?

25 MR. MILIN: Unfortunately, Your Honor, we

1 do have a hearing in another matter scheduled that
2 day, but we believe that it can be postponed. So we
3 believe that we will be available, and we'll
4 promptly let the Court know if there's any issue.

5 THE COURT: What time is your other
6 hearing in that other matter?

7 MR. MILIN: 10:00 a.m.

8 THE COURT: Okay. What sort of
9 hearing -- do you think that hearing is going to
10 take until 3:00? Again, we're going to do this by
11 telephone.

12 MR. MILIN: Your Honor, you have us
13 scared. No, 3:00 would be fine to appear before
14 Your Honor.

15 THE COURT: Okay. We'll do that by
16 telephone. All right. So I'll extend the TRO until
17 November 2nd. I want to make sure that I have
18 jurisdiction on this. Again, I believe right now
19 that I do.

20 The other thing that I would do -- or the
21 other thing I will do is, I will certainly encourage
22 the parties to actually sit down with each other,
23 maybe grab a cup of coffee and not focus on what has
24 happened in the past or the tone of some of the
25 filings in state court or here, and see if the

1 parties can come to some sort of détente. It does
2 seem that all parties are interested in trying to
3 resolve this matter amicably, which is good to hear.

4 And, again, sometimes in resolving
5 matters, it is like a 7th grade dance. No one wants
6 to go first. So I'd encourage the parties to try to
7 put some of the past behind them and try to meet and
8 talk about these things, and, perhaps, give me a
9 joint status report -- well, first let me find out,
10 are the parties willing to do that; to actually sit
11 down and try to have some conversations with each
12 other? Plaintiff's counsel?

13 MR. KANOWITZ: Yep. For the plaintiff,
14 absolutely, Your Honor.

15 THE COURT: Counsel for AREH?

16 MR. MILIN: Of course, Your Honor.

17 THE COURT: And counsel for JJ Arch and
18 Simpson?

19 MR. ISRAEL: Yes, Your Honor.

20 THE COURT: Okay. Let's do that. And
21 then let's get a joint status report from the
22 parties on Tuesday the 31st, on Halloween. And
23 hopefully the parties may be able to resolve this
24 amongst themselves or resolve a lot of this amongst
25 themselves. So that would be a joint status report

1 filed with the Court on October 31st.

2 Anything else from plaintiff today?

3 MR. KANOWITZ: No, thank you, Your Honor.
4 I appreciate the time.

5 THE COURT: Anything else from either of
6 the defendants?

7 MR. MILIN: Not from JJ Arch, Your Honor.

8 THE COURT: And in that joint status
9 report, let me know if, in fact, the parties have
10 resolved this, or if the parties are making progress
11 and wish to have some more time to work this out and
12 want to extend or adjourn the date on November 2nd.
13 Let me know that in the joint status report on the
14 31st, okay?

15 MR. MILIN: Yes, Your Honor.

16 MR. ISRAEL: Okay, Your Honor. Thank
17 you.

18 THE COURT: All right. Okay.
19 Anything else from plaintiff?

20 MR. KANOWITZ: No, Your Honor. Thank
21 you.

22 THE COURT: Anything else from either
23 defendant?

24 MR. ISRAEL: No, Your Honor.

25 MR. MILIN: No, Your Honor. Thank you.

1 THE COURT: Okay. We're adjourned.
2 Thank you.

3 MR. ISRAEL: Thank you.

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C E R T I F I C A T E

I, Adrienne M. Mignano, certify that the foregoing transcript of proceedings in the case of 608941 NJ v. Simpson, et al.; Docket #23CV8966 was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature Adrienne M. Mignano
ADRIENNE M. MIGNANO, RPR

Date: October 27, 2023